



The State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES



Thomas S. Burack, Commissioner

February 20, 2007

The Honorable Martha Fuller Clark, Chairman
Energy, Environment and Economic Development Committee
Room 103, Legislative Office Building
Concord, NH 03301

Re: SB 158 relative to review of activities affecting surface waters

Dear Chairman Fuller Clark:

Thank you for the opportunity to comment on SB 158, which would amend RSA 485-A to provide authority for the Department of Environmental Services (DES) to review and certify compliance with water quality standards for proposed activities that would result in a discharge to or withdrawal from surface waters. DES supports this legislation in concept, but has concerns about the bill as currently drafted.

Section 401 of the federal Clean Water Act requires state review and certification for proposed activities that require a federal license or permit for the construction or operation of a facility that may result in a discharge to surface waters. For example, projects that require wetlands permits issued by the Army Corps of Engineers, National Pollution Discharge Elimination System (NPDES) permits for wastewater discharges issued by the Environmental Protection Agency, and hydropower licenses issued by the Federal Energy Regulatory Commission must also receive certifications by DES that any proposed discharges into waters of the state will not violate water quality standards.

DES has historically issued Section 401 water quality certifications under RSA 485-A:13, its general water discharge permit authority. RSA 485-A:13 does not specifically refer to Section 401 or water quality certifications for projects that require federal permits. SB 158 proposes to make the state authority for issuing Section 401 water quality certificates explicit, which will bring clarity to this area of environmental law.

SB 158 would also expand the water quality certification process to state programs that regulate activities that result in surface water discharges or withdrawals. Alteration of terrain permits, large groundwater withdrawal permits, water use registrations, groundwater discharge permits, septic system permits, sludge and septage permits and approvals for public water supplies currently include consideration of water quality standards in permitting decisions. SB 158 would establish state legal authority for assessment of potential surface water quality impacts for proposed projects under all of these programs, which collectively include approximately 15,000 (or more) permit action per year.

DES supports the concept of requiring some additional level of analysis of the effects of land use changes on surface water quality. In its present form, however, SB 158 would require

The Honorable Martha Fuller Clark
February 20, 2007

reviews of the water quality impacts of potentially thousands of projects. The 401 water quality certification program is currently entirely federally funded. In terms of staff, 1.5 full time staff equivalents worked on this program in FY 2006. The fiscal impact of SB 158 has not been estimated by the Legislative Budget Assistant, but DES believes it would be substantial. DES also recommends that a statute authorizing a state water quality certification program be carefully drafted so as to anticipate and avoid potential unintended consequences, such as a *de facto* prohibition on development adjacent to surface waters with existing water quality violations.

Thank you for the opportunity to comment in support of this important legislation. DES will be available as a resource to the Committee as it considers SB 158. If you have any questions or need additional information, please do not hesitate to call Watershed Bureau Administrator Paul Currier at 271-3289 or me at 271-2958.

Sincerely,

A handwritten signature in black ink, which appears to read "Thomas S. Burack". A large, red, stylized "COPY" stamp is overlaid on the signature.

Thomas S. Burack
Commissioner

cc: Senator Jacalyn L. Cilley
Senator Margaret W. Hassan
Senator Iris W. Estabrook
Senator Martha Fuller Clark
Senator John S. Barnes
Representative Nancy F. Stiles
Representative Dennis F. Abbott
Representative Elisabeth N. Sanders
Representative Judith T. Spang